Syarikat Kemajuan Perumahan Negara Sdn Bhd v Lee Cheng & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–04–28
ABDUL MALEK PCA, TENGKU BAHARUDIN AND JAMES FOONG JJCA
8 SEPTEMBER 2005

Land Law — Housing developers — Delivery of vacant possession — Supply of water and electricity — Whether delivery of vacant possession must include supply of water and electricity ready for tapping into the building — Regulations applicable — Principles and propositions enunciated in decided cases must be considered in the light of rules and regulations applicable

Land Law — Housing developers — Vacant possession — Meaning of

By a sale and purchase agreement dated 16 May 1990 ('SPA'), the respondent purchased from the appellant, a shop house. The last date for the appellant to deliver vacant possession of the said building under the SPA was 16 May 1992. Water pipes and electricity mains were duly laid and connected to the said building on 13 January 1991. Keys to the said building were handed over to the respondent on 30 October 1991. Certificate of fitness to the said building was issued on 19 August 1993. However, electricity supply was only connected to the said building on 18 January 1994. This appeal centered on the dispute as to whether delivery of vacant possession of a house sold by a developer to a purchaser should include supply of water and electricity to the house and if so to what extent and manner.

Held, dismissing the appeal:

(1) Since this case evolved between the period of 1990 (the date of the SPA) and 1992 (the date when vacant possession was supposed to be delivered), the Housing Developers (Control and Licensing) Regulations 1989 ('1989 Regulations') should be applicable (see para 9).

(2) Whatever principles and propositions enunciated in decided cases must be considered in the light of those rules and regulations that were applicable. They cannot be of universal guide for all cases associated with late delivery of vacant possession of houses classified under the Housing Developers (Control and Licensing) Act 1966 ('the said Act') except when the appropriate rules and regulations so applied are similar. Thus, one must be cautious when relying on such authorities to support or argue against the scope and extent of water and electricity to be supplied to the constructed building under the said Act (see para 22).

(3) In the instant case, there is no doubt that the 1989 Regulations were applicable. With the phase 'vacant possession of the said building together with the connection of water and electricity supply to the said building' expressly and unambiguously stated in mandatory statutory provision of cl 20(1) and (2) of the formatted agreement set out in Sch G in the 1989 Regulations and repeated in identical fashion by cl 20(1) and (2) in the SPA, the Court of

Appeal was convinced that*Hoya Holding Sdn Bhd v Chia Thin Hing @ Cheah Thin Heng & Anor* [1994] MLJU 55 and*Lew Yoke Long & Ors v Syarikat Kar King Sdn Bhd* [2000] 4 AMR 3911 were the correct state of the law relating to the meaning of this term in respect of the 1989 Regulations. Vacant possession with connection of water and electricity to the said building must include the developer's duty to energize the water and electricity flow into the building. It is not sufficient for the developer to just lay the pipes and cables for electricity and water to connect the said building to the sub-station or water mains. The developer must ensure, at the time of delivery of vacant possession of the said building, that there is supply of water and electricity ready for tapping into the building (see para 22).

[Bahasa Malaysia summary

Melalui satu perjanjian jual beli bertarikh 16 Mei 1990 ('PJB'), responden telah membeli daripada perayu, sebuah rumah kedai. Tarikh akhir untuk perayu menyerahkan milikan kosong bangunan tersebut di bawah PJB adalah pada 16 Mei 1995. Paip air dan bekalan elektrik telah dipasang dan disambungkan ke bangunan tersebut pada 13 Januari 1991. Kunci kepada bangunan itu telah diserahkan kepada responden pada 30 Oktober 1991. Perakuan kesesuaian bangunan tersebut telah dikeluarkan pada 19 Ogos 1993. Bagaimanapun, bekalan elektrik hanya disambungkan ke bangunan itu pada 18 Januari 1994. Rayuan ini berkisarkan pertikaian tentang sama ada penyerahan milikan kosong sebuah rumah yang dijual oleh seorang pemaju kepada seorang pembeli sepatutnya termasuklah bekalan air dan elektrik ke rumah itu dan jika sedemikian setakat mana dan caranya.

Diputuskan, menolak rayuan tersebut:

(1) Memandangkan kes ini berlaku antara tahun 1990 (tarikh PJB) dan 1992 (tarikh apabila milikan kosong sepatutnya diserahkan), Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan 1989') hendaklah terpakai (lihat perenggan 9).

(2) Apa pun prinsip dan saranan yang dinyatakan dalam kes-kes yang telah diputuskan hendaklah dipertimbangkan berdasarkan rukun dan peraturan yang boleh terpakai. Ia tidaklah boleh dijadikan panduan am untuk semua kes-kes yang berkaitan penyerahan lewat milikan kosong rumah yang diklasifikasikan di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut') kecuali bila rukun dan peraturan yang digunakan adalah sama. Oleh itu, adalah perlu untuk berhati-hati apabila bergantung pada autoriti sedemikian untuk menyokong atau berhujah tentang skop dan had air dan elektrik yang patut dibekalkan kepada bangunan yang dibina di bawah Akta tersebut (lihat perenggan 22).

(3) Dalam kes semasa, tidak diragukan bahawa Peraturan 1989 adalah terpakai. Berdasarkan frasa 'vacant possession of the said building together with the connection of water and electricity supply to the said building' yang dinyatakan dengan jelas dan tidak taksa dalam peruntukan statutori mandatori kl 20(1) dan (2) kepada perjanjian yang diformatkan dalam Jadual G Peraturan 1989 dan diulangi dalam bentuk yang sama oleh kl 20(1) dan (2) dalam PJB,

Mahkamah Rayuan yakin bahawa*Hoya Holding Sdn Bhd v Chia Thin Hing @ Cheah Thin Heng & Anor* [1994] MLJU 55 dan*Lew Yoke Long & Ors v Syarikat Kar King Sdn Bhd* [2000] 4 AMR 3911 adalah kedudukan undang-undang yang betul berkaitan maksud terma ini menurut Peraturan 1989. Milikan kosong berkaitan air dan elektrik kepada bangunan itu hendaklah termasuk tanggungjawab pemaju untuk membekalkan air dan elektrik ke bangunan itu. Adalah tidak memadai untuk pemaju hanya meletakkan paip dan tali kabel elektrik dan air untuk menyambungkan bekalan dari bangunan itu ke sub stesen atau kunci air utama. Pemaju hendaklah memastikan, pada masa penyerahan milikan kosong bangunan tersebut, terdapat bekalan air dan elektrik ke bangunan itu (lihat perenggan 22).]

Notes

For cases on delivery of vacant possession, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2602–2608.

Cases referred to

Charles Muriel v Newacres Sdn Bhd [1994] MLJU 352 (refd)
Hoya Holding Sdn Bhd v Chia Thin Hing @ Cheah Thin Heng & Anor [1994] MLJU 55 (refd)
Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd [1990] 1 MLJ 15 (refd)
Lew Yoke Long & Ors v Syarikat Kar King Sdn Bhd [2000] 4 AMR 3911 (refd)
Salmah bte Sulaiman & Anor (Administratrices of the Estate of Ahmad bin Ibrahim, deceased) v Metroplex Development Sdn Bhd [1997] 1 MLJ 369 (refd)
Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai [1988] 3 MLJ 221 (refd)
Tay Ket @ Chan Kong Seong v Bumibakti Development Sdn Bhd [1994] MLJU 451 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) (Amendment) Regulations 2002
Housing Developers (Control and Licensing) Regulations 1982 Schedule E
Housing Developers (Control and Licensing) Regulations 1989 reg 11(1), Schedule G
Housing Developers (Control and Licensing) Rules 1970 r 12(1)(l)

Appeal from: Suit No 72–18 of 1995 (Magistrates' Court, Raub)

Felix Darairaj (Dorairaj Low & Teh) for the appellant.
KC Cheah (KC Cheah & Co) for the respondents.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal centers on the perennial dispute as to whether delivery of vacant possession of a house sold by a developer to a purchaser should include supply of

water and electricity to the house and if so to what extent and manner.

FACTS

[2] The undisputed facts of this case are these.

[3] By a sale and purchase agreement dated 16 May 1990 ('the SPA'), the respondent purchased from the appellant a shop house in Raub for a sum of RM95,000. Complying with reg 11(1) of the Housing Developers (Control And Licensing) Regulations 1989 ('1989 Regulations'), the SPA contains the following clauses, relevant to the dispute in this case:

Clause 17(1)

The Vendor shall, at its own cost and expense, lay or cause to be laid all necessary water, electricity and sewerage mains, gas piping (if any) and internal telephone trunking and cabling (if any), to serve the said Estate and at its own cost and expense undertake to apply for the connection of internal water, electricity, sanitary and gas installations (if any) of the said Building to the water, electricity and sewerage mains of the Appropriate Authority, and the gas mains of the relevant authority.

Clause 17(2)

The Purchaser shall be liable for and shall pay, within fourteen (14) days after the receipt of a notice requesting for payment from the Vendor, the deposits for the installation of water, electricity and gas meters and the Vendor shall bear all other costs, if any.

Clause 20(1)

The said Building shall be completed by the Vendor and vacant possession with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty-four (24) calendar months from the date of this Agreement.

Clause 20(2)

If the Vendor fails to hand over vacant possession of the said Building together with the connection of water and electricity supply to the said Building in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

Clause 21(1)

Upon the issue by the Vendor's Architect of a Certificate certifying that the construction of the said Building has been duly completed and water and electricity supply has been connected to said Building and the Purchaser having paid all monies payable under clause 4 (1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Property.

[4] The last date for the appellant to deliver vacant possession of the said building under the SPA is 16 May 1992. Water pipes and electricity mains were duly laid and connected to the said building on 13 January 1991. Keys to the said building were handed over to the respondent on 30 October 1991. Certificate of fitness to the said

building was issued on 19 August 1993. However, electricity supply was only connected to the said building on 18 January 1994.

[5] For this, the respondent claimed from the appellant in the Magistrates' Court in Raub a sum of RM15,902.73 for late delivery of vacant possession of the said building from 16 May 1992 to 18 January 1994; a total of 611 days.

[6] The learned magistrate allowed the respondent's claim with interest and costs. Dissatisfied, the appellant appealed to the High Court in Raub. Azhar Ma'ah JC (as he then was) dismissed the appeal with costs. Still discontented, the appellant filed this appeal before us.

APPELLANT'S ARGUMENT

[7] Mr Felix Dorairaj, counsel for the appellant, first submitted that the appellant has complied with its obligation to the respondent to hand over vacant possession of the said building to the respondent on time. At that time, the appellant had, at its own cost and expense, laid all the pipes and cables for connection of water and electricity to the said building as well as having applied to the appropriate authorities for such connection in accordance with cl 17(1) of the sales and purchase agreement. He then stressed that the appellant is not responsible to energize the water and electricity flow into the building. To support this, he relied on r 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970 ('the 1970 Rules') that requires the developer 'shall at his own costs and expenses cause the connection of electricity, water and sewerage mains of the appropriate authority or public authority with the internal electricity, water and sewerage mains of the housing accommodation erected for the purchaser'. To top this, he cited this court's decision in*Salmah bte Sulaiman & Anor (Administratrices of the Estate of Ahmad bin Ibrahim, deceased) v Metroplex Development Sdn Bhd* [1997] 1 MLJ 369 where, at p 372, this court has declared:

> We agree with Siti Norma Yaakob J that the rule speaks of connection of the electrical and water mains and that the respondent's obligation was only to connect electricity and water mains to the internal electricity and water mains and not the flow of water and electricity.

[8] In short, what the appellant is maintaining is that the developer is only obliged 'to connect the electricity and water mains to the internal mains of the said building; the flow of water and electricity is the responsibility of the relevant authorities'.

RESPONDENT'S CONTENTION

[9] Mr KC Cheah, counsel for the respondent, was swift to identify the fallacy of the appellant's argument that relied on an out-dated rule or regulation. He enlightened this court that the 1970 Rules has been repealed. And subsequent to this, there has been four amendments to the Housing Developers (Control and Licensing) Rules, the latest is the Housing Developers (Control and Licensing) (Amendment) Regulations 2002. But since this case evolved between the period of 1990 (the date of the sales and purchase agreement) and 1992 (the date when vacant possession was supposed to be delivered) the 1989 Regulations should be applicable. In fact, the entire terms and conditions in the SPA are pari materia to the mandatory formatted sale and purchase agreement set out in Schedule G of the 1989 Regulations where all

developers had to adopt when selling their developed properties. Under cll 20(1), 20(2) and 21(1) of the sales and purchase agreement, as spelt out in the earlier part of this judgment, the appellant when delivering vacant possession must have water and electricity supply connected to the said building. This means that the appellant, as developer, must energize the water and electricity flow into the said building. To support this contention, Mr Cheah cited a number of High Court authorities which I shall dwell into in the latter part of this judgment.

ANALYSIS

[10] With such disclosure, at the outset, it is clear that the appellant has relied on an out-dated 1970 Rules where r 12(1)(l) therein merely states:

> provisions binding on the licensed housing developer that he shall at his own costs and expenses cause the connection of electricity, water and sewerage mains of the Appropriate Authority or public authority with the internal electricity, water and sewerage mains, of the housing accommodation erected for the purchaser.

[11] After the 1970 Rules were repealed, the Housing Developers (Control And Licensing) Regulations 1982 ('1982 Regulations') came into force. 1982 Regulations requires every sale and purchase agreement for houses constructed and sold within the definition of the said Act to comply with the prescribed formatted sale and purchase agreement set out in Schedule E thereof. And cl 15(1) of the prescribed agreement states:

> The Vendor shall at its own cost and expense cause to be laid all necessary water, electricity and sewerage mains to serve the said Building and undertakes to apply for at its own cost and expense the connection of the internal water, electricity and sanitary installations of the said Building to the water, electricity and sewerage mains of the Appropriate Authority.

[12] Then cl 18(1) spells out:

> The said Building shall be completed by the Vendor and vacant possession delivered to the Purchaser within twenty-four (24) calendar months from the date of this Agreement.

[13] In April 1989, the 1982 Regulations were replaced by the 1989 Regulations. Clause 20(1) in the formatted sale and purchase agreement listed under Schedule G of the 1989 Regulation demands:

> The said Building shall be competed by the Vendor and vacant possession, with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty four (24) calendar months from the date of this Agreement.

[14] Then cl 20(2) states that:

> If the Vendor fails to hand over vacant possession of the said Building, together with the connection of water and electricity supply to the said Building, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[15] From the above, one can observe that the phraseology with regard to water and electricity supply is tied-up with vacant possession and the demand for such

amenities to be supplied and connected to the building constructed has changed since the 1970 Rules and the 1982 Regulations. The 1989 Regulations requires the developer to complete and hand over vacant possession of the building within a specific time 'with the connection of water and electricity supply to the said building'. As a result of this, a number of High Court authorities have interpreted this provision in the 1989 Regulations to mean that 'there must be water and electricity supplies actually running through the internal water pipes, electric lines and power lines in the dwelling house before the question of whether or not vacant possession has been delivered could even be considered'; per Abdul Malik Ishak J in *Hoya Holding Sdn Bhd v Chia Thin Hing @ Cheah Thin Heng & Anor* [1994] MLJU 55.

[16] In another case, *Lew Yoke Long & Ors v Syarikat Kar King Sdn Bhd* [2000] 4 AMR 3911, decided by me as judge of first instance, I have also interpreted cl 20(1) and (2) of the formatted sale and purchase agreement under Schedule G of the 1989 Regulation to say that 'water and electricity must be connected to the house before it is considered to be completed with vacant possession for the purpose of calculating time to hand over the property to the plaintiffs'. I then went on to add that 'simply put: it means when the plaintiffs entered the house upon delivery of vacant possession and turned on the lights it will be illuminated when he affixes a bulb to it. I cannot comprehend it to mean electricity supply only to a sub-station in the housing estate where the house is erected, be that becomes near or far'.

[17] Admittedly, there are cases that were decided otherwise. In *Tay Ket @ Chan Kong Seong v Bumibakti Development Sdn Bhd* [1994] MLJU 451, Wan Adnan Ismail J expressed the following views:

> As at 18 February 1987, the defendants had already caused electricity to be connected to the sub-station. As the developer, the defendants had to build the sub-station for the supply of electricity to all the houses in the project. The sub-station had been energized. What was left to be done was for meters to be installed at the houses within the project. This the defendants could not do even if they wanted to... Only LLN can install the meters and connect the electricity to the houses.

[18] But it must be noted that this case was decided based on the 1982 Regulations where the words: 'with connection of water and electricity supply to the said building' are absent. This is evidenced from the statement by the learned judge who said: 'Therefore item 3 of the Third Schedule of the Housing Developers (Control and Licensing) Regulations 1982 was complied with as soon as the defendant has energized the sub-station to enable electricity to be connected to all the houses in the project'. Thus, it is my view that this case was not decided on the same set of laws applicable to the present case.

[19] This similar approach is shown in Salmah bte Sulaiman, a decision of this court. Zakaria Yatim JCA, delivering the judgment of this court then, declared that he had 'to examine the relevant provision of the law... r 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970' in deciding on the case. But as disclosed, the 1970 Rules, similar to the 1982 Regulations, does not contain the words 'with connection of water and electricity supply to the said Building' that is evident in the 1989 Regulations.

[20] But even before the coming into force of the 1989 Regulations, there is already a line of authorities that differs from the approach of two cases mentioned

above. In *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai* [1988] 3 MLJ 221, Mustapha Hussain J had even decided that under the 1982 Regulations, vacant possession has to include the connection of water and electricity to the said house. The Supreme Court affirmed this decision in 1989.

[21] Then in *Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd* [1990] 1 MLJ 15, Abdul Malek J (as he then was) followed and adopted the approach of *Syarikat Lean Hup*. Again, this was repeated in *Charles Muriel v Newacres Sdn Bhd* [1994] MLJU 352, a decision of Abu Mansor J (as he then was).

[22] From the line of authorities cited, most cases were decided in accordance with the respective rules and regulations applicable to the facts of each case. Thus whatever principles and propositions enunciated in these cases must be considered in the light of those rules and regulations that were applicable. They cannot be of universal guide for all cases associated with late delivery of vacant possession of houses classified under the Housing Developers (Control and Licensing) Act 1966 except when the appropriate rules and regulations so applied are similar. Thus, one must be cautious when relying on such authorities to support or argue against the scope and extent of water and electricity to be supplied to the constructed building under the said Act. Here, what sauce is good for the goose is not necessarily good for the gander. The respective rules or regulations used in each case must be fully appreciated. In our instant case, there is no doubt that the 1989 Regulations are applicable. With the phase 'vacant possession of the said building together with the connection of water and electricity supply to the said building' expressly and unambiguously stated in mandatory statutory provision of cll 20(1) and (2) of the formatted agreement set out in Sch G in the 1989 Regulations and repeated in identical fashion by cl 20(1) and (2) in the SPA, I am convinced that all those statements expressed by Abdul Malik Ishak J in *Hoya Holding Sdn Bhd* and me in *Lew Yoke Long* is the correct state of the law relating to the meaning of this term in respect of the 1989 Regulations. To add, I would say that vacant possession with connection of water and electricity to the said building must include the developer's duty to energize the water and electricity flow into the building. It is not sufficient for the developer to just lay the pipes and cables for electricity and water to connect the said building to the sub-station or water mains. The developer must ensure, at the time of delivery of vacant possession of the said building, that there is supply of water and electricity ready for tapping into the building.

CONCLUSION

[23] On these considerations, I am of the view that this appeal should be dismissed with costs.

[24] My two brother judges have concurred with the grounds as stated above.

Appeal dismissed.

Reported by Peter Ling